

FEDERAL COURT OF AUSTRALIA

Gill v Minister for Immigration and Border Protection [2017] FCAFC 51

Appeal from:	<i>Gill v Minister for Immigration and Anor</i> [2016] FCCA 1868
File number:	NSD 1307 of 2016
Judges:	LOGAN, GRIFFITHS AND MOSHINSKY JJ
Date of judgment:	24 March 2017
Catchwords:	MIGRATION – appeal from a decision of the Federal Circuit Court of Australia – where the then Migration Review Tribunal (Tribunal) misheard, and made adverse findings in relation to, some of the appellant’s responses to questions posed by a Tribunal member – whether the primary judge erred in finding that the Tribunal did not fall into jurisdictional error in its fact-finding concerning the appellant’s credibility and the genuineness of a work experience letter provided in support of the application for a skilled visa – whether the Tribunal engaged in fact-finding that was illogical, irrational or lacked any probative evidence – whether errors were material – significance of the phrase “reasonably suspects” in s 97 of the <i>Migration Act 1958</i> (Cth) – whether primary judge erred in concluding that even if the Tribunal fell into jurisdictional error, there was no utility in setting aside the Tribunal’s decision and remitting the matter for reconsideration Held: appeal allowed, with costs
Legislation:	<i>Migration Act 1958</i> (Cth) ss 65, 97, 347, 348, 349, 353, 357A, 360, 368, 425 <i>Migration Regulations 1994</i> (Cth) cl 485.224
Cases cited:	<i>ARG15 v Minister for Immigration and Border Protection</i> [2016] FCAFC 174 <i>Avon Downs Pty Ltd v Federal Commissioner of Taxation</i> (1949) 78 CLR 353 <i>CQG15 v Minister for Immigration and Border Protection</i> [2016] FCAFC 146 <i>East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission</i> (2007) 233 CLR 229 <i>George v Rockett</i> [1990] HCA 26; 170 CLR 104 <i>John v Rees</i> [1970] Ch 345

Liversidge v Anderson [1942] AC 206
Minister for Immigration and Border Protection v CZBP
 [2014] FCAFC 105
Minister for Immigration & Ethnic Affairs v Wu Shan Liang
 (1996) 185 CLR 259
*Minister for Immigration and Multicultural and Indigenous
 Affairs v SCAR* [2003] FCAFC 126; 128 FCR 553
Minister for Immigration and Multicultural Affairs v SGLB
 [2004] HCA 32
Minister for Immigration and Border Protection v Singh
 [2014] FCAFC 1; 231 FCR 437
Minister for Immigration and Border Protection v Singh
 [2016] FCAFC 183
Minister for Immigration and Citizenship v SZMDS [2010]
 HCA 16; 240 CLR 611
Minister for Immigration and Multicultural Affairs v Yusuf
 [2001] HCA 30; 206 CLR 323
Perera v Minister for Immigration and Multicultural Affairs
 [1999] FCA 507; 92 FCR 6
Prior v Mole [2017] HCA 10
R v Army Council; Ex parte Ravenscroft [1917] 2 KB 504
Re Refugee Tribunal; Ex parte Aala [2000] HCA 57; 204
 CLR 82
*Secretary of State for Education and Science v Tameside
 Metropolitan Borough Council* [1977] AC 1014
Sun v Minister for Immigration and Border Protection
 (2016) 243 FCR 220
SZQBN v Minister for Immigration and Border Protection
 [2014] FCA 686; 226 FCR 68
SZRMQ v Minister for Immigration and Border Protection
 [2013] FCAFC 142; 219 FCR 212
SZWCO v Minister for Immigration and Border Protection
 [2016] FCA 51
*WACO v Minister for Immigration and Multicultural and
 Indigenous Affairs* [2003] FCAFC 171; 131 FCR 511
WALN v Minister for Immigration and Multicultural Affairs
 [2006] FCAFC 131

Date of hearing:	6 March 2017
Date of last submissions:	14 March 2017
Registry:	New South Wales
Division:	General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 102

Counsel for the Appellant: Ms MA Schilling (pro bono)

Counsel for the Respondents: Mr G Johnson

Solicitor for the
Respondents: Sparke Helmore

ORDERS

NSD 1307 of 2016

BETWEEN: **SIKANDER SINGH GILL**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGES: **LOGAN, GRIFFITHS AND MOSHINSKY JJ**

DATE OF ORDER: **24 MARCH 2017**

THE COURT ORDERS THAT:

1. 1. The appeal be allowed.
2. 2. The orders of the Federal Circuit Court of Australia made 21 July 2016 be set aside and in lieu thereof it be ordered that:
 - (a) (a) the decision of the then Migration Review Tribunal dated 25 September 2014 be quashed;
 - (b) (b) the matter be remitted to the Administrative Appeals Tribunal for redetermination according to law; and
 - (c) (c) the first respondent pay the appellant's costs of the proceeding, as agreed or assessed.
3. 3. The first respondent pay the appellant's costs of the appeal, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

LOGAN J:

1 I have had the advantage of reading in draft the joint judgment of Griffiths and Moshinsky JJ.

2 Subject to what follows, which does not affect the outcome of the appeal, I agree with their Honours' reasons for judgment and with the orders which they propose. I also wish to add some additional reasons why, in my view, those orders ought to be made. For each of these purposes, I gratefully adopt the summary of the facts offered in the joint judgment and employ the like abbreviations.

3 Section 65 of the Act fixes upon "satisfaction" by the Minister or his or her delegate that, materially, the "prescribed criteria" for a particular visa have been satisfied: s 65(1)(a)(ii). This Ministerial "satisfaction" is thus a jurisdictional fact upon which the statutory obligation to grant or to refuse a visa turns.

4 In the circumstances of the present case, the relevant criterion was PIC 4020, as required by cl 485.224 of Sch 2 to the *Migration Regulations 1994* (Cth). Materially, that criterion stated that, "There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer ... a bogus document". The definition of "bogus document" is found in s 97 of the Act, which is set out in the joint judgment. In *Sun v Minister for Immigration and Border Protection* (2016) 243 FCR 220 at [3] I observed of that definition:

3 Given that, by its then definition in s 97 of the *Migration Act 1958* (Cth) (the Act), a "bogus document", as defined, need be nothing more than a document that the Minister reasonably suspects to have particular qualities, that term is a minor classic of Orwellianism. That hardly makes it unique in that Act. A "bogus document", as defined, may or may not in fact be bogus. Having regard to the definition, a more accurate term would be "suspected bogus document".

5 In this fashion, one issue for determination by the Tribunal, sitting in place of the Minister (s 348(1) of the Act), was whether the Tribunal was satisfied that there was no evidence before the Tribunal that Mr Gill had given to the Minister a document that the Tribunal reasonably suspected purported to have been but was not issued in respect of him.

6 In *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 at [21] (*SZMDS*), Gummow ACJ and Kiefel J, referring to s 65 of the Act, regarded the

following observations made by Lord Wilberforce in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1047 (*Tameside*) in relation to the judicial review of the exercise of powers conditioned upon a state of satisfaction by a Minister or other official as to a state of affairs as of “first importance”:

“The section is framed in a ‘subjective’ form – if the Secretary of State ‘is satisfied’. This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, *whether the judgment has been made upon a proper self-direction as to those facts*, [and] whether the judgment has not been made upon other facts which ought not to have been taken into account.”

[Emphasis by Gummow ACJ and Kiefel JJ]

7 7 *Tameside* had earlier commended itself to Brennan CJ, Toohey, McHugh and Gummow JJ in *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (*Wu Shan Liang*) as exemplifying that in England powers so conditioned were not unexaminable on judicial review. The root Australian authority for this same proposition, as their Honours mention in *Wu Shan Liang* at 275, is the judgment of Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 (*Avon Downs*). In its explicit qualification of “suspicion” in the s 97 definition of “bogus document”, the adjective “reasonable” means that there must be no basis for inferring the presence of one or more of the grounds described by Dixon J in *Avon Downs*, as opposed to meaning that no reasonable person could so suspect: *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at [80] per Gummow and Hayne JJ.

8 8 To these general authorities concerning the amenability to and basis of the judicial review of a power, the exercise of which is conditioned upon the satisfaction of a Minister or other official as to a state of affairs and the import of the word “reasonable” as an express, adjectival qualification of suspicion must be added *George v Rockett* [1990] HCA 26; 170 CLR 104 (*George v Rockett*). What was stated in that case in relation to the judicial review of the exercise of a power dependent upon satisfaction that there exists a reasonable suspicion as to a state of affairs must be applied in light of the text of PIC 4020. Unlike the provision considered in *George v Rockett*, PIC 4020 prescribes a negative rather than a positive state of affairs – “no evidence”. Even so, that negative might aptly be described as an example of a “negative pregnant” carrying with it, by implication, its affirmative opposite. If the resultant

satisfaction is that there is not no evidence that a “bogus document” as defined has been given to the Minister that must be because of satisfaction that there is some such evidence.

9 9 The limits of the judicial review of the Tribunal’s decision to affirm the visa refusal decision, consequential upon its satisfaction that there is some such evidence, were not confined to determining whether the member constituting the Tribunal came subjectively to hold in good faith a suspicion about the document. So much was accepted in *George v Rockett*, at 112, in recording that Lord Atkin’s dissent on this point in *Liversidge v Anderson* [1942] AC 206 is now orthodox. The evidence before the Tribunal must be such as to ground in the mind of a reasonable person a suspicion that a given document had one or more of the qualities mentioned in the s 97 definition of “bogus document”. It is in this context that the emphasis given by Gummow ACJ and Kiefel J in *SZMDS* to Lord Wilberforce’s observation in *Tameside* that “whether the judgment has been made upon a proper self-direction as to those facts” being a basis for the judicial review of a satisfaction based power is of importance in the present case, having regard to the Tribunal’s reasons.

10 10 Here the relevant document was the work experience letter. The Tribunal’s satisfaction that there was evidence before the Minister such as would ground a conclusion that this letter was a “bogus document” was, as Griffiths and Moshinsky JJ demonstrate in their joint judgment, founded upon a fundamental misunderstanding of answers given by Mr Gill in the course of his evidence before the Tribunal to questions inspired by the contents of the work experience letter. The Tribunal did not properly direct itself as to the facts. The resultant and necessary inference is that the Tribunal’s satisfaction was not reasonable.

11 11 It was not, with respect, open to the learned Federal Circuit Court judge on judicial review to address whether the evidence before the Tribunal, properly understood, grounded a reasonable suspicion. That exceeded the permissible limits of judicial review. Rather, upon appreciating that there had been no proper self-direction by the Tribunal, the Tribunal’s decision ought to have been quashed and the matter remitted for rehearing on the merits.

12 12 It is possible to reach that conclusion, and Griffiths and Moshinsky JJ do, without additionally having regard to the affidavit of the appellant’s solicitor read, apparently without objection, before the Federal Circuit Court. Where I respectfully differ from their Honours is in relation to whether that conclusion may be bolstered by reference to that affidavit. A number of recipes were annexed to this affidavit. One of them does indeed demonstrate that baking powder is an ingredient for at least some chicken schnitzel recipes. Those recipes

were not before the Tribunal member when she came to make her decision. The focus of PIC 4020 was on the evidence before the Tribunal. The recipes concerned did not form part of this evidence. For this reason, I do not consider that they were admissible in the proceeding in the Federal Circuit Court.

- 13 13 The outcome exemplifies a meaningful check on what would otherwise be an exercise of arbitrary power by the Tribunal, sitting in place of the Minister but not a usurpation of the role of the Tribunal, within the limits of legality, of making its own evaluation of the evidence before it. It also exemplifies the importance to a determination as to whether those limits have been exceeded of the statutory requirement in s 368 of the Act that the Tribunal furnish reasons.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 23 March 2017

REASONS FOR JUDGMENT

GRIFFITHS AND MOSHINSKY JJ:

Introduction

14 14 This appeal is from two orders of the Federal Circuit Court of Australia (the **FCCA**) made on 21 July 2016. By those orders, the FCCA dismissed the appellant’s amended application for judicial review of a decision of the then Migration Review Tribunal (now the Administrative Appeals Tribunal (the **Tribunal**)), and ordered the appellant to pay the Minister’s costs. By its decision dated 25 September 2014, the then Tribunal affirmed a decision of the Minister’s delegate to refuse to grant the appellant a Skilled (Provisional) (Class VC) visa (a **skilled visa**).

Summary of background facts

15 15 The appellant applied for a skilled visa as long ago as 12 March 2009. There is no dispute that there was a requirement for the grant of such a visa that the appellant nominate an occupation and provide evidence of a skills assessment for his nominated occupation. The appellant’s nominated occupation was “Cook” and he claimed in his visa application that his skills in that occupation had been assessed by Trades Recognition Australia (**TRA**). He further claimed to have obtained a skills assessment on 31 October 2008. In his visa application form, the appellant provided details of his employment with an entity called Oakleigh Catering JMark from 26 April 2007 to 17 July 2008, along with a description of the duties he performed in that position. In his application to the TRA for the skills assessment he provided a copy of a written reference dated 17 July 2008 from Oakleigh Catering JMark and signed by Mr Malcolm Phelps. It is convenient to describe this as the **work experience letter** (extracts from which are set out in [22] below). The work experience letter described the appellant’s duties and responsibilities when he worked at the Oasis Bistro located at Oakleigh Carnegie RSL club, which was run by Oakleigh Catering JMark.

16 16 For reasons which are unexplained, there was then a long delay before the Department wrote to the appellant on 15 May 2012 and invited him to comment on information in its possession which suggested that he had provided, or caused to be provided, a “bogus document” as defined in s 97 of the *Migration Act 1958* (Cth) (the **Act**), or false or misleading information in relation to his visa application. This, if true, meant that he would

not meet Public Interest Criterion 4020 (**PIC 4020**), and that his visa application could be refused. The Department invited the appellant to respond to the following matters:

- (1) (1) on 30 March 2009, the appellant had provided in support of his visa application a skills assessment from TRA dated 31 October 2008;
- (2) (2) to obtain that assessment, he was required to have supplied the TRA with documents proving that he had 900 hours of work experience;
- (3) (3) on 12 January 2011, the Department received from the TRA a copy of the work experience letter;
- (4) (4) on 16 May 2011, an informant (who was identified as the former head chef and catering manager of Oakleigh Catering JMark) advised the Department that he was aware that some of the references from the employer were not genuine; and
- (5) (5) accordingly, the Department had reason to believe that the skills assessment had been fraudulently obtained.

17 17 By a letter dated 10 July 2012, the appellant's migration agent responded to the Department's invitation to comment on the matters raised in its letter dated 15 May 2012 and stated that the documents provided to the TRA were genuine. Additional material was provided in support of the visa application.

18 18 On 6 August 2012 (i.e. almost three and a half years after the visa application was lodged), the Minister's delegate refused to grant the visa on the basis that the appellant did not satisfy PIC 4020.

19 19 On 24 August 2012, the appellant applied to the Tribunal for review of that decision. More than two years later, on 25 September 2014, the Tribunal affirmed that delegate's decision. It did so after conducting a hearing on 5 September 2014, at which the appellant gave oral evidence.

The Tribunal's decision

20 20 In its reasons, the Tribunal described the issue in the review as whether the appellant met PIC 4020. It referred to the work experience letter as well as to the appellant's response to the Department's letter dated 15 May 2012. It noted that this response included a covering letter which asserted that the appellant did work at Oakleigh Catering JMark but that when he went to contact them they had finished their contract and neither the RSL nor the appellant had been able to contact Mr Phelps. It further noted that the appellant claimed that he had

always been employed as a Cook and, after working with Oakleigh Catering JMark, he worked at the Whitehorse Club assisting the chef in the kitchen and then at the Bombay Crown restaurant as a Cook. It noted that the appellant had provided a reference letter from Bombay Crown, signed by the head chef and owner, which certified that the appellant had worked in that restaurant until the date of the letter and had completed more than 600 hours professional cooking work experience. The Tribunal referred to other material provided by the appellant in response to the Department's letter dated 15 May 2012, including his statutory declaration dated 9 July 2012 in which he stated that he had genuinely been employed as a Cook by Oakleigh Catering JMark from 7 April 2007 to 30 July 2008.

21 21 The Tribunal made reference to material on the Departmental file, including a telephone interview held on 16 May 2011 with Mr Phelps. It noted that the record of interview stated that Mr Phelps was contacted by a Departmental inspector 12 months earlier in relation to workplace references and that Mr Phelps became aware at that time that some of the references issued in the name of his business were not genuine and had not, in fact, been issued by him. The interview recorded Mr Phelps as saying that an unidentified migration agent had issued the references fraudulently and that he had retracted all letters of reference as he could not be confident that they were genuinely issued. Mr Phelps was recorded as saying that, despite all his references being withdrawn, "he was apologetic to any of the students who may have been genuine, however were disadvantaged due to the fraudulent actions of a Migration Agent".

22 22 Against this background, the Tribunal explained in its reasons that it sought detailed information from the appellant in order to satisfy itself as to whether he had genuinely completed the work experience as claimed by him and as documented in the work experience letter. It is convenient to set out relevant parts of the work experience letter (without alteration):

Oakleigh Catering JMARK

Oakleigh Catering JMARK is located at the Oakleigh Carnegie RSL. The Oasis Bistro that is situated at 95-97 Drummond Street Oakleigh. The Oasis Bistro is fully licensed and has affordable meals with a full range of Australian dishes. The Club offers Gaming and Members Room service which is available to the general public as well as a hall and function room for hire. We cater for meetings, special occasions, product launches and conferences. The Oasis Bistro is open for lunch Monday to Saturday and dinner from Thursday to Saturday.

Training Details

This is to certify that Sikander Singh Gill of G17/43 High Street, Preston 3072 Vic, has completed his training at Oakleigh Carnegie RSL Oasis Bistro from April 07 until the present. He has worked and trained as Cook, attaining over 900 hours of commercial cooking experience under the supervision of Malcolm Phelps, Head Chef/Catering Manager.

As part of his training and working conditions Sikander had to ensure that his knowledge of menu items was sound and that he was able to follow a consistent recipe for all items prepared. He has also had to be aware of the dietary content of dishes and the effect that cooking has on the nutritional value of food. Sikander has a high standard of personal and food hygiene.

...

Duties and Responsibilities

...

Kitchen Duties:

Prepared entrée items and light meals such as:

1. Soup of the Day.
2. Toasted Ham, Cheese and Tomato sandwich.
3. Diggers Hamburger.
4. Roast Beef Roll with Salad.
5. Diggers Steak or Chicken Burger.

Washed and prepared fruits and vegetables for accompanying salads and vegetables. Used proper knife handling and cutting techniques to chop, peel, cut and seed fruits and vegetables:

1. Side dish of roasted vegetables.
2. Side dish of salad.
3. Side dish of chips.

Roasted, Deep Fried, Shallow Fried, Grilled and Baked vegetables, cheese, seafood and meat for dishes such as:

1. Lambs Fry and Bacon.
2. Rissoles.
3. Bangers and Garlic Mash.
4. Chicken Schnitzel/Veal Schnitzel.
5. Mixed Grill.
6. Roast of the Day.
7. Beer Battered Fish.
8. Rump steak.

Prepared sauces for Rump Steak:

1. Pepper sauce
2. Garlic sauce.
3. Dianne sauce.

...

23 23 At this point, it is desirable to set out extracts from a transcript of the Tribunal hearing prepared by Auscript Australasia Pty Limited and, in particular, to the exchanges which took place concerning the work experience letter and the appellant's recollection of the work he had done at the Oasis Bistro. A full copy of the audio recording was in evidence below and on the appeal. The Minister did not object to the written transcript also being put in evidence on the appeal. The redacted words in the written transcript are the name of the dish to which the appellant referred and in relation to which the parties could not agree the correct transcription:

MS SYNON: Okay. And were there any other work experience students there when you were there?

THE WITNESS: Sorry, what's that?

MS SYNON: Other work experience students?

THE WITNESS: At that time, no. No.

MS SYNON: Okay. And how did you keep track of your 900 hours?

THE WITNESS: I just - like, at that time I have a phone and I, like ---

MS SYNON: You have a what?

THE WITNESS: I have a phone, so I just add my hours - like, every day I work, this, this, this, into my phone and in 2010 I lost my phone. So I ---

MS SYNON: Everybody says that. Isn't that amazing? Everyone keeps their hours in their phone ---

THE WITNESS: Because ---

MS SYNON: --- and then they lose their phone.

THE WITNESS: --- I just got it from my friend.

MS SYNON: I'm so sick of hearing that story at every hearing. Okay. So had you backed up the information on your phone if it was so important?

THE WITNESS: Yes, at that time I thought maybe - I don't need anything for future, so - well ---

MS SYNON: All right. What did your duties include? I've just got to say that story I've heard so many times that I just don't believe it any more. Everyone keeps their hours in there and loses their phone. I'm just so over hearing that same story, because it can't be right in every case. Nonetheless, what were your duties or claimed duties?

THE WITNESS: I do – it's like to make meals.

MS SYNON: What kind of meals?

THE WITNESS: Like, the stuff from menu.

MS SYNON: Sorry?

THE WITNESS: Like, main meals.

MS SYNON: So what were they?

THE WITNESS: Like ---

MS SYNON: What was the most popular meal at that bistro?

THE WITNESS: The bistro is – it was, like, I think, Chicken Parma.

MS SYNON: What's the second most popular?

THE WITNESS: It was chicken schnitzel, veal schnitzel, [redacted].

MS SYNON: What kind of risottos did you serve?

THE WITNESS: Like ---

MS SYNON: What kind of risottos did you serve?

THE WITNESS: The Italian ones.

MS SYNON: Yes. But what was in them?

THE WITNESS: Like ---

MS SYNON: What kind of risottos were on the menu?

THE WITNESS: It was just [redacted].

MS SYNON: Yes, but what was in them? Risotto just means a rice dish. What was in them?

THE WITNESS: Like the normal [redacted].

MS SYNON: Yes, but what is it? What's a normal risotto? Because there's heaps of different kinds and different restaurants serve different types. What did they serve?

THE WITNESS: Yes, we used serve the Italian ---

MS SYNON: Sorry?

THE WITNESS: Italian [redacted]. That's all.

MS SYNON: Okay. Risotto just means rice dish in Italian.

THE WITNESS: Yes.

MS SYNON: What kind of risotto was it?

THE WITNESS: It was like a – like, just – I can't explain about which one ---

MS SYNON: Well, you must have – what ingredients did you put in the risotto?

THE WITNESS: Rice and a little flour and ---

MS SYNON: Flour in a risotto. What else?

THE WITNESS: That was it, yes.

MS SYNON: Okay. I don't accept that you made risottos, because that's not – what other dishes did you make? Delve into your cooking skills a bit more, what other dishes?

THE WITNESS: Yes, like, we make like chicken schnitzels.

MS SYNON: Right. Did you crumb them yourself?

THE WITNESS: Yes.

MS SYNON: What with?

THE WITNESS: Like, with the oil or – we would just have them, like, baking powder.

MS SYNON: Sorry?

THE WITNESS: Like baking powder, a little bit of powder.

MS SYNON: Baking powder is what you crumbed them with?

THE WITNESS: Yes. It was, yes.

MS SYNON: So you crumbed schnitzels with baking powder? Is that right?

THE WITNESS: Yes.

MS SYNON: Is that it?

THE WITNESS: [redacted].

MS SYNON: Did you do a full 900 hours there?

THE WITNESS: Yes.

MS SYNON: Really?

THE WITNESS: Yes.

MS SYNON: You can't even tell me the basic ingredients for the most popular dishes. How did you make the Chicken Parma? How did you make it? Do you remember? No, you don't remember. You need to have an audible answer so the hearing can – tape can record you?

THE WITNESS: I said "no".

MS SYNON: No. What other dishes were on the menu?

THE WITNESS: I don't remember many dishes at all.

MS SYNON: Sorry, speak up.

THE WITNESS: I don't remember many dishes now, but, yes, there were a few – like, there were ---

MS SYNON: What are some examples of the soup of the day? Remembering, of course, that when you answer these questions I have this information.

THE WITNESS: Yes.

MS SYNON: So tell me what some of the soups of the days were?

THE WITNESS: I'm just trying to think or

MS SYNON: You can't remember the soups of the day? It is better if you're honest with me. It goes better for you in the long run if you're honest. Can you remember the soups of the day?

THE WITNESS: No.

MS SYNON: Okay. Tell me some of the sauces that you provided for the steaks? What are the types of sauces that were offered?

THE WITNESS: One was a garlic sauce or ---

MS SYNON: Garlic?

THE WITNESS: Yes.

MS SYNON: What else? What was the most popular sauce for steaks? Can you remember any other sauces? Can you remember any other sauces? No? Did you say "no"?

THE WITNESS: No.

MS SYNON: Okay. Tell me how you made the garlic sauce?

THE WITNESS: I can't remember, no, this one.

MS SYNON: I'm giving you an opportunity to be honest with me now and I will record if you are.

THE WITNESS: Yes.

MS SYNON: Did you do 900 hours work experience at Jay Mark Catering as claimed?

THE WITNESS: Yes. I worked there.

MS SYNON: You worked there. For how long?

THE WITNESS: For about, like – yeah, nine – like, yes, 11 months, 12 months.

MS SYNON: What were the burgers called?

THE WITNESS: What were they?

MS SYNON: What were the burgers called?

THE WITNESS: Chicken burgers and ham/cheese burgers.

MS SYNON: No, they have a name. What were they called on the menu?

THE WITNESS: Like

MS SYNON: Sorry?

THE WITNESS: A name

MS SYNON: What were they called? What was their menu title?

THE WITNESS: Chicken burgers they were called. Ham/cheese burgers.

MS SYNON: Okay. What – explain if you made any sandwiches there, any toasted sandwiches? Were there toasted sandwiches on the menu?

THE WITNESS: Toasted sandwiches. I think not.

MS SYNON: Good. Explain what bangers and mash is?

THE WITNESS: Mash?

MS SYNON: That's on the menu. Explain what it is, bangers and mash?

THE WITNESS: Mash is like – to mash the potatoes.

MS SYNON: Mashed potatoes, yes. But what is the dish, bangers and mash?

THE WITNESS: Bangers?

MS SYNON: Bangers and mash, what is the dish? What is it?

THE WITNESS: Bangers and mash.

MS SYNON: What is it? Do you know what it is?

THE WITNESS: No, I can't remember.

24 24 It is now desirable to set out all of [20] of the Tribunal's statement of decision and reasons, in which the Tribunal provides a summary of the appellant's oral evidence relating to his work experience:

20. In summary, the relevant oral evidence of the applicant was:

- • He completed both a Certificate III in Hospitality and an Advanced Diploma of Hospitality Management at the South Pacific Institute: [sic]
- • He first approached Malcolm Phelps in March 2007 while studying his Certificate III. He was referred to Malcolm Phelps through a friend, Jagdev Singh, with whom he was living at the time. He said the restaurant was located in Drummond Street Oakleigh and he travelled there via train from Reservoir disembarking at Oakleigh station which was a 3 to 4 minute walk from the premises. He described the building as yellow with the front gate on Drummond Street.
- • He said both Malcolm Phelps and his brother Robert Phelps worked there with Robert both helping to manage and cook. Asked if he was sure Robert was Malcolm's brother he said yes. Malcolm had told him this. The applicant said he spoke to Malcolm and gave him his résumé. Malcolm said he would call him but when he did not do so he visited again a month later and on this occasion Malcolm told him he was able to give him volunteer work.
- • He commenced working there in April typically working

from 3pm to 10pm three nights a week, usually Wednesdays, Thursdays and Fridays but also occasionally on a Sunday. He said the busiest day is Friday. The applicant said the main Cook was Malcolm and other people who worked there were: Guy, Rachel and Alex. He said there were no other work experience students when he worked. The applicant said for the first day he just looked at what was happening and on the second day Malcolm showed him what to do.

- - The applicant said he kept track of his 900 hours on his phone which he lost in 2010.
- - The applicant said his duties were to make the meals and the most popular dishes were Chicken Parmigianas, Schnitzels and Risottos. Asked how he made a risotto the applicant said this was rice and flour. The Tribunal confirmed this was his evidence. Asked how he crumbed schnitzels the applicant said he did so with baking powder. Asked how he prepared a chicken parmigiana, after considerable hesitation, the applicant said he did not know. The Tribunal asked the applicant to explain some of the 'soup of the day' examples to which the applicant replied he could not remember. The Tribunal asked the applicant which sauces he prepared. He said garlic but could not remember any other sauces. Asked how he made the garlic sauce the applicant said he could not remember. At this stage the Tribunal confirmed with the applicant that he claimed he had worked there for 11 or 12 months. He said yes. Asked the name of the particular burgers offered on the menu he responded chicken burgers and ham and cheese burgers. Asked if there were toasted sandwiches on the menu the applicant said no. Asked what the dish bangers and mash was the applicant did not know.
- - The applicant said he worked at Oakleigh Catering as claimed but cannot prove it as it was 7 to 8 years ago. He said he had tried to phone Malcolm about 10,000 times but his phone is disconnected. The applicant said he did not keep in contact with anyone else at the bistro. After completing his work at Oakleigh Catering he laid carpet for a few months, worked as a waiter at the Melbourne Exhibition Centre, worked at the Whitehorse Club as a kitchen hand and worked at Bombay Crown where he was employed for about two nights a week as a Cook. The applicant said he has another casual job cleaning about two days a week.
- - Later the applicant completed 450 hours' work experience at the Heritage Indian Restaurant which he needed to complete to get his second skills assessments. He has been employed since January 2013 as a Chef on a casual basis. He provided a copy of his recent PAYG certificate that records an income of \$7035 from the Heritage Indian Restaurant for the year ending 2013.
- - Invited to make any submissions in relation to compelling or compassionate and compelling circumstances in relation to the waiver provisions of PIC 4020, the applicant did not make any submissions.
- - In final comments the applicant said he has been living in Australia for eight years and has essentially grown up here, coming

here after finishing his last year of school in India. He said he can't prove his TRA work experience as he doesn't have the evidence and it is too long ago. He said he has tried to continue working in the hospitality industry and emphasised he now has a new skills assessment.

25 25 The Tribunal acknowledged in [21] of its reasons that it was “mindful” that the appellant’s claimed work experience related to a period in 2007 and 2008 (i.e. more than six years before the Tribunal’s hearing), but added that it expected nevertheless that he would “retain at least some accurate recollection of the menu items and/or dish components it was claimed he prepared in a period exceeding 900 hours”. It found that he was unable to do so. The Tribunal stated at [21] (without alteration and with emphasis added):

... Whilst providing evidence that the most popular dishes in the Bistro were Chicken Parmigianas, Schnitzels and Risottos he was unable to accurately describe how we might have prepared any of these dishes or what ingredients they comprised. **In particular** his evidence that he prepared risotto using rice and flour and that he crumbed schnitzels with baking powder and further that he did not know how to prepare a chicken parmigiana, create in the Tribunal’s mind significant doubt as to whether the work experience letter the applicant provided to TRA is genuine. Not only was the applicant unable to describe how these menu items were prepared but only one of the “most popular” menu items the applicant specified was noted in his work experience reference. The work experience reference also states that the applicant “prepared entree items and light meals such as” soup of the day, toasted sandwiches and Diggers Hamburgers. In relation to these items the applicant said he could not remember any of the soup of the day examples, toasted sandwiches were not on the menu and could not name Diggers Hamburgers although did say he prepared chicken burgers and ham and cheese burgers. The work experience reference also states the applicant “prepared sauces for rump steak” but the applicant could only name one of the three sauces listed in the work experience reference saying only that he had made garlic sauce but could not remember how to do it.

26 26 Thus, relying on the work experience letter and the appellant’s oral evidence to the Tribunal, the Tribunal said at [22] that it did not accept that he performed the claimed work experience described in the work experience letter. While the Tribunal accepted that the appellant had visited the former premises of Oakleigh Catering and may have met Mr Phelps and “even performed some basic kitchen hand duties”, it did not accept that the contents of the work experience letter were genuine or that he had completed the duties and responsibilities set out in that letter, including over 900 hours of commercial cooking experience.

27 27 It might be noted at this point that the Tribunal made no reference, either in the transcript or in its reasons for decision, to the fact that risotto was not one of the dishes to which explicit reference was made in the work experience letter.

28 The Tribunal repeated at [23] that while it acknowledged the appellant's knowledge of his employment duties performed seven or eight years previously "may become diminished in some aspects", it did not accept that he would not be able to remember basic elements of the dishes it was claimed he cooked and/or prepared. The Tribunal described the appellant's evidence "to be lacking in credibility and detail". It found that the work experience letter was not genuine and it "reasonably suspects" that the skills assessment was obtained because of a false or misleading statement, namely the information in the work experience letter (the reference to "reasonably suspects" is obviously a reference to that phrase as it appears in the definition of "bogus document" in s 97 of the *Act*, which is set out in [57] below). These findings informed the Tribunal's ultimate conclusion that the appellant did not meet PIC 4020. Furthermore, the Tribunal declined to waive the requirements of PIC 4020.

The FCCA proceeding

29 The appellant was represented by counsel in the FCCA.

30 The appellant pressed two grounds of judicial review. The first was that the Tribunal "jurisdictionally erred in making findings that the applicant's recollection of ingredients used to cook risotto and chicken schnitzel were flawed". The second was that the Tribunal "jurisdictionally erred" in forming its view that the appellant only mentioned one of the most popular menu items because, in forming that view, the Tribunal:

- (6) (1) failed to afford the applicant procedural fairness; and
- (7) (2) otherwise acted unreasonably, irrationally or without probative evidence.

31 The primary judge noted that the whole of the audio hearing in the Tribunal was played in the FCCA before both counsel made submissions. His Honour said at [25] that the transcript supported a finding that there was "a mishearing by the Tribunal member in relation to a question asked in respect of one of the items described by the applicant as a popular dish". He found that the Tribunal had understood the appellant to have said that one of the popular dishes was "risotto", whereas in fact what the appellant had said was a literal pronunciation of the word "rissoles", which the applicant pronounced phonetically as "r-i-z-o-l-o-s".

32 It is desirable to set out [26] and [27] of the primary judge's reasons for judgment:

- 26 Relevantly, the Tribunal member raised with the applicant how the item that the Tribunal had misheard was prepared. At the commencement of the

hearing, the Tribunal member explained to the applicant that if the applicant did not understand anything said by the Tribunal the applicant was to raise that issue, and the applicant confirmed that he understood it had been said by the Tribunal member.

- 27 Having listened to the audio, it is clear that the applicant understood the Tribunal was asking about what the applicant called “rizolos”, and the Tribunal member thought the applicant was responding in relation to risotto. Counsel for the applicant submitted that this was a material error by the Tribunal that effectively coloured the Tribunal's approach to the balance of the applicant's evidence in the hearing, as well as having material significance in relation to the credibility findings made by the Tribunal adverse to the applicant. Counsel for the applicant also identified how that misunderstanding by the delegate of the applicant's response meant that the applicant had identified more than one of the items as being a popular dish on the non-exhaustive menu set out in a letter dated 17 July 2008.

- 33 33 The primary judge then summarised the appellant's submissions in respect of the Tribunal's adverse credibility findings and its specific finding in relation to risotto. Those submissions included that the finding in relation to risotto was not supported by any evidence and that the adverse credibility finding concerning the work experience was unreasonable, illogical or irrational by reason of the Tribunal's error concerning how risotto was cooked. It was also submitted that the Tribunal's decision was unreasonable in the legal sense because of these errors and that the Tribunal's mishearing of the word “risotto” constituted procedural unfairness or other illogicality or unreasonableness in the finding of critical facts. The primary judge noted the appellant's submission that the Tribunal's reference to “chicken parmigiana” was incorrect as the appellant had only referred to “chicken parma” and that the reference to chicken parma not being on the menu was a matter in respect of which the work experience letter did not purport to be exhaustive.

- 34 34 It is desirable to set out [31] to [38] of the primary judge's reasons for judgment, which explain why the Court rejected the appellant's case relating to these alleged errors by the Tribunal:

- 31 Having listened to the transcript and taking into account the material that has been admitted into evidence, the Court is satisfied that the applicant had a genuine and meaningful hearing. This was a case where there were a multitude of inconsistencies in relation to the applicant's evidence, a large number of which the Tribunal made reference to. The error in relation to risotto was an error in finding of fact and one which was entirely understandable, given the applicant's pronunciation of rissoles in the phonetic manner “rizolos”.
- 32 Indeed that pronunciation of “rizolos” was on one view entirely consistent with the applicant not having any understanding of the menu and “rizolos” was not the item “rissoles”. The applicant could not explain how “rizolos” were made. It was the lack of understanding of the menu and how to make

the items named that were the focus of questions by the Tribunal.

- 33 The Tribunal provided comprehensive reasons in relation to the adverse credibility findings that extended well beyond the matter the subject of an error in relation to risotto. Those adverse credibility findings were manifestly open. The contradictions between the applicant's evidence and the letter dated 17 July 2008 are ones that extended well beyond any issue concerning the description of how to make risotto and well beyond whether there was more than one of the items correctly described on the menu as a popular dish. The error as to the risotto and the arguable error about the number of dishes are not material to the adverse findings by the Tribunal.

- 34 Reference was made to a combination of items which the work experience letter purported to identify the applicant as having acquired knowledge of the menu items that was sound and, relevantly, the Tribunal said:

In relation to these items, the applicant said he could not remember any of the soup of the day examples, toasted sandwiches were not on the menu and he could not name Digger's Burgers, although he did say he prepared chicken burgers and ham and cheese burgers.

- 35 The Tribunal made reference to the sauces and identified that the applicant could only name one of the three sauces listed in the work experience and that the applicant could not say how to make it. The reference to the applicant's oral evidence at the hearing in finding that it did not accept that the applicant had performed the work experience described in the work experience letter was a finding that cannot be said to be unreasonable and was clearly open on the material before the Tribunal. The reference to the applicant's lack of knowledge of cooking tasks detailed in his work experience letter go well beyond the limited errors relating to risotto or the number of popular dishes on the menu that were identified by counsel for the applicant. The adverse credit findings were not founded on these errors of fact.

- 36 It is clear from the audio tape that the Tribunal raised its concern in relation to the applicant's credit on a number of occasions and that the Tribunal provided the applicant with a proper opportunity to respond in relation to its credibility concerns. Even in relation to the issue of how to make risotto, the Tribunal clearly gave the applicant a further opportunity to provide a satisfactory explanation. None was forthcoming from the applicant.

- 37 I find that the errors in relation to risotto and the number of popular dishes made by the Tribunal were no more than mere errors of fact and had no material impact on the adverse credibility findings made by the Tribunal. The error in relation to risotto was not a critical finding. This was a case where there was overwhelming evidence adduced from the applicant as to his lack of knowledge of the cooking tasks detailed in the work experience letter. The suggestion that the Tribunal member had not earlier raised any credit issue with the applicant prior to the issue of the risotto is also not correct.

- 38 It is clear from the transcript that the Tribunal member was first concerned about the reference adduced by the applicant referring to a particular position which is not supported by the documents that he provided. It is also clear that the Tribunal went well beyond exploring the issue of risotto in relation to the applicant's lack of knowledge of the cooking tasks detailed in the letter. The applicant could not describe the "bangers" content of bangers and mash. It was not necessary for the Tribunal to refer to every aspect of the

inconsistencies in the applicant's evidence in its adverse credibility findings.

35 35 In [39], the primary judge rejected any suggestion that the Tribunal may have closed its mind to the appellant's evidence, a proposition which his Honour found was not supported by the recording of the hearing or the Tribunal's reasons. Although the primary judge said several times that there was no allegation of bias, his Honour found that the erroneous mishearing of the word "risotto" by the Tribunal "is not conduct by reason of which a fair-minded lay observer might reasonably apprehend that the Tribunal might not bring a fair, impartial and independent mind to the determination of the matter on its merits" (at [40]).

36 36 His Honour then proceeded to reject the following submissions made by the appellant:

- (8) (1) that it was the reference to "risotto" that gave the Tribunal significant doubt as to the genuineness of the work experience letter;
- (9) (2) that the mishearing of the word "risotto" coloured the balance of the Tribunal's reasoning; and
- (10) (3) that the erroneous reference to "risotto" led the Tribunal to form the view that the appellant lacked basic knowledge of cooking tasks detailed in the work experience letter.

37 37 It is desirable to set out [42] and [43] of the reasons for judgment:

42 There was overwhelming evidence from the applicant that displayed his lack of basic knowledge of cooking tasks detailed in the work experience letter. I reject the submission that the Tribunal formed an adverse view of the applicant because of the alleged reference to only one of the three items mentioned as the most popular items. I reject the submission that the misunderstanding by the Tribunal in relation to the applicant's pronunciation of "rissoles" gave rise to any denial of procedural fairness. I find there was no error by the Tribunal in relation to chicken parma, described by the applicant as a popular dish that was not on the menu. The reference to chicken parmigiana was not a material error of fact or material to the adverse credit findings.

43 The adverse findings by the Tribunal in relation to the applicant's credit cannot be said to be unreasonable, irrational or to lack a probative basis. The adverse findings by the Tribunal in relation to the bogus document were open on the material before the Tribunal and cannot be said to be unreasonable, irrational or without probative evidence. The adverse finding by the Tribunal that the applicant did not perform the work experience described in the work experience letter was open on the material before the Tribunal. The applicant had a genuine and meaningful hearing and the errors did not give rise to any denial of procedural fairness or any breach of the statutory hearing obligations. Ground 2 fails to make out any jurisdictional error.

38 38 As to the second ground of judicial review (i.e. ground 3 in the amended judicial review application below), the primary judge said at [44] that, “for the reasons I have given there was no failure to provide the applicant procedural fairness and the assertions that the Tribunal acted unreasonably, irrationally or without probative evidence are without substance”.

39 39 His Honour then added that, even if a different view had been taken in relation to the materiality of the risotto errors, relief would not have been granted because he found that the impact of the errors could be “entirely discounted”. At [46], the primary judge said:

... The Court finds that this is a case where there was an overwhelming combination of inconsistencies and unsatisfactory aspects in relation to the applicant's evidence. The Court accepts that if it had found a jurisdictional error, *prima facie* the applicant would be entitled to relief and that the onus is upon the respondent to satisfy the Court that the granting of relief would be of no utility.

40 40 The primary judge then explained at [47] that, in concluding that there would be no utility in granting any relief, he took into account inconsistencies in the appellant’s evidence, which he described as going “way beyond the matters identified by the Tribunal”. Those inconsistencies, which the primary judge said were apparent from the audio recording, included:

- (11) (1) “a difference in relation to the days of the week when it is alleged the applicant worked and the hours that he worked”;
- (12) (2) “differences in relation to the relationship between the owner and another material person described in the letter”;
- (13) (3) “differences between the description of the applicant’s duties in his application and the letter”; and
- (14) (4) “numerous deficiencies in the applicant’s ability to describe the duties that he performed or how to make the items involved”.

41 41 The primary judge described as “overwhelming” the case that the work experience letter was bogus. He said that no reasonable Tribunal could have accepted that the appellant performed the work alleged in the work experience letter and that any such finding would be unreasonable and perverse.

42 42 Finally, at [48], the primary judge acknowledged that it was not a matter for the Court to make adverse credibility findings itself and that, ordinarily, where there was an issue of

credit in respect of a jurisdictional error, the matter should be remitted to the Tribunal for further hearing. But his Honour then stated that this was a case where the appellant's evidence was "so obviously untruthful and untenable that the Court is satisfied there would be no useful result in remitting the matter if it had found any jurisdictional error".

For these reasons, the amended judicial review application was dismissed, with costs.

The appeal

The appellant relied upon an amended notice of appeal, which contained the following grounds (without alteration):

1. Having found that the Tribunal misheard the Applicant's evidence that he cooked "rissoles" as "risotto" (the **risotto mishearing**):
 - (a) the primary judge erred in holding that the decision of the Tribunal was not affected by jurisdictional error as a result of the risotto mishearing;
 - (b) the primary judge erred in concluding that, if the risotto mishearing did result in jurisdictional error, there would be no utility in remitting the matter to the Tribunal.
- 1A. The primary judge erred in finding that the Applicant's evidence before the Tribunal was that he made "r-i-z-o-l-o-s".

Particulars

On the second, third and fourth occasions that the Applicant gave evidence to the Tribunal that he made "rissoles" (T17 LL 13, 18, 28) the Applicant clearly pronounced the word as "riss-oles".

2. The primary judge erred in finding that the decision of the Tribunal was not affected by jurisdictional error because, in making its adverse credibility finding and decision in respect of the applicant, the Tribunal:
 - (a) engaged in a process of fact finding which was illogical, irrational and legally unreasonable;
 - (b) made a series of critical findings of fact for which there was no, or no probative, evidence.

Particulars

The critical findings of fact for which there was no, or no probative, evidence, in addition to the risotto mishearing, were that

- (i) one of the three "most popular" menu items was "*risotto*";
- (ii) only one of the three "most popular" menu items was noted in the letter dated 17 July 2008 from Mr Malcolm Phelps, Head Chef/Catering Manager of Oakleigh Catering JMark (the **JMark Letter**);
- (iii) the Applicant was "unable" to "*retain at least some accurate*

recollection of the menu items”;

- (iv) the Applicant “did not know” was “bangers and mash” was;
 - (v) the letter from Bombay Crown, signed by Jaswinder Pannu, did not state that the applicant was employed by the Bombay Crown Restaurant.
3. The primary judge erred in finding that the decision of the Tribunal was not affected by jurisdictional error because the Tribunal failed to afford the Applicant procedural fairness, failed to provide the Applicant with a meaningful opportunity to give evidence and present argument as required by section 360(1) of the Act, and failed to conduct the “review” contemplated by the Act:
- (a) The Tribunal failed to listen to, alternatively persistently misheard, the Applicant’s answers to the Tribunal’s questions;
 - (b) By reason of the Tribunal’s findings and its conduct of the hearing, a fair minded and reasonably well-informed observer might reasonably have apprehended that the Tribunal might not have brought an impartial mind to bear on its decision.

Particulars

In addition to the matters referred to in Grounds 2 and 3(a) above, the said apprehension arises from:

- (i) The statements made by the Tribunal at T16 lines 1 to 23; T 19 lines 17-19; T19 lines 42-43 which indicated that the Tribunal had formed a fixed and adverse view of the Applicant’s credit;
- (ii) The Tribunal’s failure to listen to the Applicant’s evidence regarding the menu items, or to attempt to correlate that evidence with the contents of the JMark Letter;
- (iii) The Tribunal’s statement to the Applicant at T19 lines 8-9 that the Tribunal had information regarding examples of the “soup of the day”, where the Tribunal had no such information;
- (iv) The Tribunal stated to the Applicant at the hearing that it would contact the manager of the Heritage Indian Restaurant to verify the Applicant’s evidence regarding his employment but did not do so.

The Applicant will seek leave to play segments of the recording of the tribunal at the hearing of this appeal.

Disposition of the appeal

45 45 There are two central issues in the appeal. The first is whether the primary judge fell into appealable error in rejecting the appellant’s claim that the Tribunal’s decision was vitiated by jurisdictional error. The second is whether the primary judge fell into appealable error in concluding that, even if there was jurisdictional error on the part of the Tribunal, there was no utility in setting aside the Tribunal’s decision and remitting the matter to it for reconsideration. It is convenient to deal with each of these matters in turn.

(a) Did the Tribunal fall into jurisdictional error?

46 46 The resolution of this issue must start with a close examination of the provisions in the *Act* relating to the Tribunal's role in conducting a review under Div 3 of Pt 5.

47 47 At the date of the Tribunal's decision, s 349 provided as follows:

349 Powers of Migration Review Tribunal

- (1) The Tribunal may, for the purposes of the review of an MRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision.
- (2) The Tribunal may:
 - (a) affirm the decision; or
 - (b) vary the decision; or
 - (c) if the decision relates to a prescribed matter—remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations; or
 - (d) set the decision aside and substitute a new decision.
- (3) If the Tribunal:
 - (a) varies the decision; or
 - (b) sets aside the decision and substitutes a new decision;the decision as varied or substituted is taken (except for the purpose of appeals from decisions of the Tribunal) to be a decision of the Minister.
- (4) To avoid doubt, the Tribunal must not, by varying a decision or setting a decision aside and substituting a new decision, purport to make a decision that is not authorised by the Act or the regulations.

48 48 The decision which was the subject of review was a decision of the Minister's delegate under s 65 to refuse the grant of the skilled visa. At the relevant time s 65 provided:

65 Decision to grant or refuse to grant visa

- (1) After considering a valid application for a visa, the Minister:
 - (a) if satisfied that:
 - (i) the health criteria for it (if any) have been satisfied; and
 - (ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and
 - (iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or

cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

- (iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

- (b) if not so satisfied, is to refuse to grant the visa.

Note: See also section 195A, under which the Minister has a non-compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister's power under that section.

...

49 49 Section 347 identified the requirements for there to be a valid application for review by the Tribunal. It is unnecessary to set out that provision.

50 50 Section 348 imposed an obligation on the Tribunal to review a decision if a valid application was made under s 347. Section 348 provided:

348 Migration Review Tribunal must review decisions

- (1) Subject to subsection (2), if an application is properly made under section 347 for review of an MRT-reviewable decision, the Tribunal must review the decision.
- (2) The Tribunal must not review, or continue to review, a decision in relation to which the Minister has issued a conclusive certificate under section 339.

51 51 The powers of the Tribunal were set out in s 349. For present purposes, it is sufficient to note s 349(1), which provided:

349 Powers of Migration Review Tribunal

- (1) The Tribunal may, for the purposes of the review of an MRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision.

...

52 52 Section 353 (which was in Div 4 of Pt 5) provided for the Tribunal's way of operating. It provided:

353 Tribunal's way of operating

- (1) The Tribunal shall, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

- (2) The Tribunal, in reviewing a decision:
 - (a) is not bound by technicalities, legal forms or rules of evidence; and
 - (b) shall act according to substantial justice and the merits of the case.

Additional provisions relating to the conduct of a review by the Tribunal were set out in Div 5 of Pt 5. They included s 357A, which provided that Div 5 “is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with”.

Subsection 360(1) is an important provision in this proceeding. It provided as follows (noting that ss 360(2) and (3) provided for exceptions to the duty imposed by s 360(1), but those exceptions are not relevant here):

360 Tribunal must invite applicant to appear

- (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.

...

By virtue of s 368 (which was in Div 6 of Pt 5), where the Tribunal made a decision on a review, it was obliged (subject to some exceptions which are not relevant) to prepare a written statement which had to comply with the requirements of s 368(1). That sub-section provided as follows:

368 Tribunal’s decision and written statement

Written statement of decision

- (1) Where the Tribunal makes its decision on a review, the Tribunal must, subject to paragraphs 375A(2)(b) and 376(3)(b), make a written statement that:
 - (a) sets out the decision of the Tribunal on the review; and
 - (b) sets out the reasons for the decision; and
 - (c) sets out the findings on any material questions of fact; and
 - (d) refers to the evidence or any other material on which the findings of fact were based; and
 - (e) unless the decision is given orally—records the day and time the statement is made; and
 - (f) if the decision is given orally—records the day and time the decision is given orally.

...

56 56 As noted above, the Tribunal identified the issue in the review as whether the appellant met PIC 4020, as required by cl 485.224 of Sch 2 to the *Migration Regulations 1994* (Cth). At the relevant time, PIC 4020(1) and (5) stated:

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

- (a) the application for the visa; or
- (b) a visa that the applicant held in the period of 12 months before the application was made.

...

(5) In this clause:

information that is false or misleading in a material particular means information that is:

- (a) false or misleading at the time it is given; and
- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

Note: Regulation 1.03 defines ***bogus document*** as having the same meaning as in section 97 of the Act.

57 57 Section 97 of the *Act* defined “bogus document” as follows:

97 Interpretation

In this Subdivision:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

58 58 It might be noted at this point that, while the decision under s 65 of the *Act* whether to grant or refuse a visa depended upon the decision-maker’s satisfaction that the specified requirements were met (see [48] above), whether or not the document was a “bogus document” within the meaning of s 97 turned on whether the decision-maker “reasonably

suspects” that the document meets one of the specified criteria (see [57] above). The significance of that phrase will be developed further below (see [90] ff).

(b) Judicial review of Tribunal’s fact-finding

59 The Tribunal’s determination under s 65(1) of the *Act* that it was not satisfied that the appellant met the criteria prescribed by the *Act* and *Regulations* for the grant of a skilled visa turned on a jurisdictional fact (see *Minister for Immigration and Multicultural Affairs v SGLB* [2004] HCA 32; 78 ALJR 992 (**SGLB**) at [37]-[38] per Gummow and Hayne JJ and *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 (**SZMDS**) at [102] per Crennan and Bell JJ). Those judgments also stand for the proposition that such a determination is vitiated by jurisdictional error if the determination was “irrational, illogical and not based on findings or inferences of fact supported by logical grounds”.

60 In *SZMDS*, Crennan and Bell JJ emphasised at [131] that the test for illogicality or irrationality:

... must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

61 Their Honours further explained at [133] that the correct approach is to ask whether it was open to the Tribunal to engage in the process of reasoning in which it did engage and to make the findings it did make on the material before it.

62 Additional relevant principles concerning a claim of jurisdictional error based on illogical or irrational findings of fact or reasoning were summarised as follows by the Full Court (Griffiths, Perry and Bromwich JJ) in *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174 at [47]:

Subsequent authorities have established that, for a decision to be vitiated for jurisdictional error based on illogical or irrational findings of fact or reason, “extreme” illogicality or irrationality must be shown “measured against the standard that it is not enough for the question of fact to be one on which reasonable minds may come to different conclusions and against the framework of the inquiry being as to whether or not there has been jurisdictional error on the part of the Tribunal” (see *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; 212 FCR 99 (**SZRKT**) at [148] per Robertson J; *SZOOR v Minister for Immigration and Citizenship* [2012] FCAFC 58; 202 FCR 1 (**SZOOR**) at [84] per McKerracher J (with whom Reeves J agreed); and *Minister for Immigration and Border Protection v*

SZUXN [2016] FCA 516 at [52] per Wigney J). Illogicality or irrationality in that extreme sense may be considered not only in relation to the end result, but also extends to fact finding which leads to the end result, albeit that, as Robertson J emphasised in *SZRKT* at [151], the overarching question is whether the decision was affected by jurisdictional error (see also the observations of Beech-Jones J in *BKE v Office of Children's Guardian* [2015] NSWSC 523 at [113] and the cases referred to therein).

63 63 The first judicial review ground pressed by the appellant below was to the effect that the Tribunal fell into jurisdictional error in its fact-finding concerning the appellant's recollection of ingredients used to cook risotto and chicken schnitzel. This necessarily raised the issue of the extent to which such findings of fact were amenable to judicial review for jurisdictional error. The Minister correctly acknowledged that such findings are not impervious to judicial review. Mr Johnson, who appeared for the Minister, properly accepted that jurisdictional error could be established if, for instance, the findings were illogical or based on no evidence at all.

64 64 That is not, however, an exhaustive statement of the scope of judicial review for jurisdictional error of fact-finding. As the Full Court recently observed in *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146 (***CQG15***) at [38] per McKerracher, Griffiths and Rangiah JJ, findings of fact, including findings of fact relating to credibility, are susceptible to judicial review on several grounds:

38 There are several other potential bases upon which credit findings can be challenged. Recitation of the expression that credibility is a matter par excellence should not be understood as precluding challenges to credibility or, indeed, other findings of fact on any basis. While there is no suggestion in this case that this is what has occurred, the frequency of adoption of the expression should not obscure the availability of challenges on recognised grounds, such as:

- (a) failure to afford procedural fairness;
- (b) reaching a finding without any logical or probative basis;
- (c) unreasonableness; and/or
- (d) jurisdictional error as discussed by Flick J in *SZVAP*.

65 65 It may also be accepted that, where jurisdictional error is established in relation to the Tribunal's fact-finding, it must also be demonstrated that the error is material to the decision which the Tribunal actually made (see *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323 (***Yusuf***) at [89] per McHugh, Gummow and Hayne JJ).

66 66 As noted above, the Tribunal's statutory obligation under s 348 of the *Act* was to review the delegate's decision. Moreover, the Tribunal had a statutory obligation under

s 360, in a case such as the present, to invite the appellant to appear before it and give evidence and present arguments relating to the issues arising in relation to the decision under review. It is well established that the invitation which the Tribunal must give is to a real and meaningful hearing (see *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* [2003] FCAFC 126; 128 FCR 553 (**SCAR**) at [37] per Gray, Cooper and Selway JJ with reference to s 425 of the *Act*, but whose observations apply equally to s 360, and *Minister for Immigration and Border Protection v Singh* [2016] FCAFC 183 at [61] – [63] per Kenny, Perram and Mortimer JJ). This is an objective requirement (see *SZQBN v Minister for Immigration and Border Protection* [2014] FCA 686; 226 FCR 68 at [15] per Flick J). Part of the Tribunal’s duties in conducting a review was to make findings on any material questions of fact. It is necessarily implicit in the obligation imposed by s 368 that the written statement which the Tribunal must produce after it has made a decision on a review must contain a statement of the Tribunal’s findings on any material questions of fact.

67 In our respectful view, for the following reasons, the primary judge erred in rejecting the appellant’s claim that the Tribunal fell into jurisdictional error in its fact-finding concerning the genuineness of the work experience letter and the appellant’s credibility more broadly.

68 It is convenient to address this ground of appeal by reference to the various matters particularised in ground 2 of the amended notice of appeal. It is also necessary to address an additional matter which was relied upon by the appellant in support of this ground of appeal which, although not particularised in the amended notice of appeal, was the subject of detailed submissions by both parties. That matter relates to the Tribunal’s findings concerning the appellant’s oral evidence as to how he crumbed chicken schnitzels. The Minister did not object to this matter being raised on the appeal.

(a) The findings concerning risotto

69 The primary judge found that the appellant used the word “rizolos” on several occasions and that the Tribunal misunderstood this as a reference to “risotto”, but held that this did not give rise to jurisdictional error. In our view he erred in so doing.

70 Rissoles were included among the non-exhaustive list of dishes mentioned in the work experience letter, but risotto was not. The Tribunal’s misunderstanding that the appellant was referring to “risotto” was an important part of the Tribunal’s reasoning for concluding that the

work experience letter was not genuine and the appellant was not a credible witness. The Tribunal's incredulity on this matter related to the appellant's evidence that he prepared risotto using rice and flour. When the Tribunal member repeatedly asked the appellant to say what kind of "risottos" were on the menu, on three separate occasions he said "Italian". There was a total breakdown in communication between the appellant and the Tribunal on this subject matter in that the appellant was evidently referring to Italian rissoles, while the Tribunal member was talking about Italian risottos. The miscommunication was perhaps exacerbated by the repeated reference to the dish being "Italian".

71 71 The mishearing and miscommunication formed part of the basis for the Tribunal's adverse conclusions concerning the genuineness of the work experience letter and the appellant's credibility. The Tribunal's findings concerning risotto were not supported by logical grounds and lacked any probative evidence. They were predicated on a fundamental misunderstanding of the dish to which the appellant's oral evidence related. Because the Tribunal erroneously believed that the appellant's evidence was directed to risottos, it disbelieved him when he said that he prepared the dish, which he described as "rizolos", using rice and flour. Moreover, this error also contributed to the Tribunal's adverse credibility finding based upon its belief that the appellant could name only one of the popular dishes served at the Bistro.

72 72 Applying the approach of Crennan and Bell JJ in *SZMDS*, we consider that it was not open to the Tribunal to make the adverse findings which it did relating to this aspect of the appellant's evidence. That was because the Tribunal had a critical misunderstanding that the appellant's evidence was directed to "risottos" when, in fact, it was not.

(b) The findings concerning the most popular dishes

73 73 It was also erroneous and illogical for the Tribunal to make adverse credibility findings based upon its finding that only one of the most popular dishes identified by the appellant was in the work experience letter. In fact there were at least three, namely chicken schnitzel, veal schnitzel and "rissoles". The Tribunal's failure to understand what the appellant was saying in relation to "rizolos" contributed to this further error and thus reinforces the materiality of that earlier error.

(c) The finding concerning the crumbing of chicken schnitzels

74 74 The Tribunal's adverse findings arising from the appellant's evidence that he used baking powder in crumbing chicken schnitzels lacked probative evidence and might also be characterised as illogical, particularly when regard is had to the evidence on this topic which was adduced below. The appellant's oral evidence is set out in the transcript at [23] above. When asked what he crumbed chicken schnitzels with, the appellant said oil and "a little bit of baking powder". The Tribunal regarded this answer as reflecting poorly on the appellant's credibility because the Tribunal clearly believed that baking powder was not used in crumbing chicken schnitzels. The Tribunal pointed to no evidence to support that view. And, perhaps more significantly, the primary judge erred in not taking into account in the judicial review proceeding below the unchallenged evidence of the appellant's solicitor which attached several recipes which demonstrated that baking powder is an ingredient for at least some chicken schnitzel recipes. It was not open to the Tribunal to make the adverse findings which it did on this matter because they were predicated on an erroneous belief, which was entirely unsupported by the evidence, that baking powder was not used to crumb chicken schnitzel.

(d) The finding that appellant was unable to retain at least some accurate recollection of the menu items

75 75 This finding relied in part on the Tribunal's erroneous findings concerning risotto, the crumbing of chicken schnitzels and the most popular dishes on the Bistro menu. It is evident, however, that this finding was also based on the Tribunal's assessment of other aspects of the appellant's evidence, as is recorded in [21] of the Tribunal's reasons for decision. We do not consider that this particular finding adds anything of relevance to the appellant's case.

(e) The finding concerning "bangers and mash"

76 76 The Tribunal found at [20] of its reasons for decision that the appellant did not know what "bangers and mash" was. This finding is criticised by the appellant on the basis that he was able accurately to describe "mash" as "to mash the potatoes". That is true, but we do not consider that this makes the Tribunal's finding illogical or irrational or that it lacked probative evidence. The transcript records the appellant as saying that he could not remember what the dish "bangers and mash" was. Accordingly, there was some probative evidence to support this particular finding by the Tribunal. Nor can the finding be characterised as illogical or irrational in the relevant sense.

(f) The Bombay Crown letter

77 77 The Tribunal's finding at [15] of its reasons for decision that the letter from Bombay Crown "does not state the applicant was employed by Bombay Crown restaurant" is factually incorrect. The letter contains three separate references to the appellant having been employed there. There is no probative evidence to support the Tribunal's finding to the contrary. But, on a fair reading of the Tribunal's reasons, we consider that the Tribunal placed no reliance on this particular finding in arriving at its ultimate conclusions. There is no reference to the finding in [21]-[23], which are the critical paragraphs explaining the Tribunal's reasons for rejecting the review application. Accordingly, any error on the part of the Tribunal relating to the Bombay Crown letter is immaterial.

78 78 In determining whether or not the Tribunal's mishearing of the appellant's oral evidence gave rise to jurisdictional error it is important to note the nature of the issue which was of immediate concern to the Tribunal. That issue, as defined by s 97 of the *Act*, was whether the work experience letter was a "bogus document". This issue turned on whether the Tribunal "reasonably suspects" that the work experience letter fell within one of the three categories of document defined therein (see [57] above). It is plain from the Tribunal's reasons at [23] that the reasons why it reasonably suspected that the work experience document was bogus and why the appellant's evidence was not credible was because of its view that the appellant was unable "to remember basic elements of the dishes it was claimed he cooked and/or prepared" and its finding that his evidence lacked "credibility and detail". There can be no doubt that this view was informed in part by the Tribunal's assessment of the appellant's evidence that he prepared "risotto" using rice and flour, that he crumbed schnitzels with baking powder, and that only one of his identified most popular dishes was in the work experience letter. These matters are expressly referred to in [21] of the Tribunal's reasons and follow immediately after the beginning of the sentence which states "In particular". This serves to highlight the significance of that particular evidence in the Tribunal's findings and its ultimate conclusion in relation to s 65 of the *Act*. It is true that there were also other matters which the Tribunal relied upon in making its adverse credibility findings. But for reasons which will be developed shortly, this is not a case where it can confidently be concluded that the relevant matters were not material to the Tribunal's conclusion.

79 79 The Minister submitted that any erroneous fact-finding by the Tribunal concerning the appellant's evidence relating to these matters were not material errors because the Tribunal

relied upon other matters in concluding both that the work experience letter was not genuine and the appellant's evidence was not credible. Those other matters, as set out in [21] of the Tribunal's reasons, were that:

- (15) (1) the appellant did not know how to prepare a chicken parmigiana;
- (16) (2) he could not remember any of the soup of the day examples;
- (17) (3) he said that toasted sandwiches were not on the menu;
- (18) (4) he could not name Diggers Hamburgers; and
- (19) (5) he could only name one of the three sauces listed in the work experience letter, i.e. garlic sauce and he could not remember how to make that sauce.

80 80 For the following reasons, the Minister's submission should be rejected. First, as noted above, the Tribunal member gave particular prominence to her adverse findings relating to the appellant's evidence that he prepared risotto using rice and flour and that he crumbed schnitzels with baking powder. They follow immediately after the reference in [21] to the words "In particular".

81 81 Secondly, and perhaps more significantly, it is evident on a fair reading of the Tribunal's reasons that its reasoning process leading up to its ultimate conclusion that the work experience letter was bogus and the appellant's evidence lacked credibility was to weigh, on the one hand, all the adverse findings set out in [21] against, on the other hand, other matters which are set out in [22] and [23] and which may have explained the deficiencies in the appellant's oral evidence. Those matters, as set out in [22] and [23] respectively of the Tribunal's reasons for decision were:

- (20) (1) the Tribunal's acknowledgment that the appellant was able to describe some aspects of Oakleigh Catering and the Tribunal's acceptance that the appellant had visited the former premises of Oakleigh Catering, may have met Mr Phelps and even performed some basic kitchen hand duties; and
- (21) (2) the Tribunal's acknowledgment that the appellant's knowledge of his employment duties performed seven or eight years previously "may become diminished in some aspects".

82 82 Having regard to the weighing exercise conducted by the Tribunal in these critical paragraphs of its reasons, it cannot be said that the weighing exercise would have produced the same outcome if the Tribunal had not taken into account its illogical and erroneous

findings of fact relating to risottos, the crumbing of chicken schnitzels and the appellant's identification of the most popular dishes. In other words, this is not a case where illogical findings of fact were not material to the Tribunal's ultimate conclusions (see Wigney J's helpful analysis in *SZWCO v Minister for Immigration and Border Protection* [2016] FCA 51 at [60] to [67], relating to *inter alia* adverse credibility findings which are based on a range of matters, only some of which are illogical or irrational).

(c) Breach of s 360 of the Act

83 83 Ground 3 of the amended notice of appeal raises the question whether the primary judge erred in failing to find that the appellant was not given a real and meaningful opportunity to give evidence and present arguments as required by s 360 of the *Act* and principles of procedural fairness.

84 84 The appellant submitted that the appeal should be approached by analogy with a line of cases which deal with whether mistranslation or misinterpretation amounts to a failure to comply with requirements such as s 425 of the *Act* (in the case of the Tribunal, the equivalent provision was s 360) or constitutes procedural unfairness (see, for example, *WALN v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 131; *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 171; 131 FCR 511 and *Perera v Minister for Immigration and Multicultural Affairs* [1999] FCA 507; 92 FCR 6). In oral address, Ms Schilling (who appeared pro bono for the appellant) said that it is sufficient for the Court to address this aspect of the appellant's case as a breach of s 360, as opposed to general law procedural unfairness.

85 85 The essence of s 360 is that the Tribunal ensure that the appellant has the opportunity for a fair hearing. As noted in [66] above, the Tribunal is obliged to give a review applicant a meaningful opportunity to appear and present evidence and argument. Moreover, as the Full Court held in *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; 231 FCR 437 at [51], what is a "meaningful opportunity, or a real chance, will be fact dependent in each case".

86 86 In an appropriate case, the Tribunal is obliged to ensure that the standard of interpretation or translation is sufficient to enable the review applicant to give evidence and present arguments in order to communicate the substance of his or her case and to present arguments in relation to the issues raised. As Allsop CJ observed in *SZRMQ v Minister for Immigration and Border Protection* [2013] FCAFC 142; 219 FCR 212 (***SZRMQ***) at [22]

(with whom Robertson J agreed) in relation to general procedural fairness requirements (but which also applied to s 360):

This implicitly incorporates understanding what the decision-maker is saying.

87 87 To similar effect, although in dissent, Flick J made the following observations in *SZRMQ* at [46] by reference to misinterpretations or mistranslations, but which observations apply equally to the circumstances here:

For present purposes, it is considered to be a mistake to fix the standard of interpretation by reference to touchstones such as whether a translation has been “accurate” or whether any particular interpreter meets the standard of a “*first-flight interpreter*”. Errors in translation will inevitably occur. Even in the absence of such errors, words or expressions used may initially fall short of conveying an intended meaning. Even when proceedings are being conducted in English by those fluent in the English language, it may require two or more attempts to accurately convey a particular meaning. In those contexts where a claimant is entitled to be heard, that entitlement necessarily demands that any hearing involves a meaningful opportunity where that which is sought to be conveyed by both the claimant and the decision-maker is conveyed in a real and meaningful manner. Initial errors in translation may be corrected by subsequent questioning and answers. A danger necessarily lurks in errors that may go undetected at a hearing and which only emerge after a hearing has concluded. But whether the error emerges during the administrative hearing itself, or subsequently, the fact that an error in translation may have occurred may assume no ultimate significance if the true meaning and content of that which is sought to be expressed ultimately emerges.

88 88 In our respectful view, s 360 imposed an objective requirement on the Tribunal to ensure that it understood what the appellant was saying on issues which arose in relation to the review (whether or not there was an interpreter) and to ensure that the appellant understood what the Tribunal was saying on those issues. This was part of its obligation to ensure that the opportunity to be heard was a “meaningful” opportunity (see [66] above).

89 89 We consider that the requirements of s 360 were not met in the particular circumstances here. The requirement imposed by s 360 is an objective requirement. Whether or not the Tribunal is aware of the actual circumstances does not defeat the Tribunal’s obligation under that provision (see *SCAR* at [37]). As the primary judge found, the audio recording establishes that the appellant used the word “rizolos” on several occasions (it may be that the appellant’s pronunciation of that word varied on the four occasions it was used by him but such variations as occurred are insufficient to disturb the primary judge’s findings on this matter). The Tribunal made no attempt to ask what the appellant meant when he used the word “rizolos” and it wrongly assumed that he was referring to risotto. It is difficult to understand how the Tribunal came to that view, particularly in circumstances where, as noted

above, risotto was not mentioned in the work experience letter which was being used by the Tribunal in questioning the appellant, yet the word “rissoles” did appear on that letter. That word is much closer to the appellant’s phonetical pronunciation of “rizolos” (ie rissoles) than is the word “risotto”.

(d) The significance of the phrase “reasonably suspects” in s 97

90 90 The wording of s 97 of the *Act* has particular significance in the context of the appeal. The work experience letter can only be a “bogus document” within the meaning of that provision if the Tribunal “reasonably suspects” that it fell within one of the three categories defined in that provision. The phrase “reasonably suspects” is important. As the High Court observed in *George v Rockett* [1990] HCA 26; 170 CLR 104 (***George v Rockett***) at [12], with reference to s 679 of *The Criminal Code* (Qld) (which provided that a justice may issue a search warrant “[I]f it appears to a justice, ... that there are reasonable grounds for suspecting...” (footnotes omitted):

When a statute prescribes that there must be “reasonable grounds” for a state of mind — including suspicion and belief — it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person. That was the point of Lord Atkin's famous, and now orthodox, dissent in *Liversidge v. Anderson*: see *Nakkuda Ali v. M.F. De S. Jayaratne*; *Reg. v. Inland Revenue Commissioner*; *Ex parte Rossminster Ltd*; *Bradley v. The Commonwealth*; *W.A. Pines Pty. Ltd. v. Bannerman*. That requirement opens many administrative decisions to judicial review and precludes the arbitrary exercise of many statutory powers: see, e.g., *Attorney-General v. Reynolds*. Therefore it must appear to the issuing justice, not merely to the person seeking the search warrant, that reasonable grounds for the relevant suspicion and belief exist...

91 91 These principles were recently reaffirmed by the High Court in *Prior v Mole* [2017] HCA 10 (***Prior v Mole***) at [4] per Kiefel and Bell JJ, [24] per Gageler J, [73] per Nettle J and [98] per Gordon J. Their Honours also emphasised that the test of reasonable grounds for “a belief” is objective.

92 92 In our opinion, the principles set out in *George v Rockett* and *Prior v Mole* are equally apposite to a provision such as s 97 of the *Act*, which does not refer to “reasonable grounds” or a “belief”, but instead uses the phrase “reasonably suspects”. Although it is clear that “belief” is more than “suspicion” (see *George v Rockett* at [14] and [15]), it is necessarily implicit in the phrase “reasonably suspects” that the facts and circumstances, objectively viewed, must be sufficient to induce the relevant state of mind, i.e. suspicion, in a reasonable person.

93 As noted above, the Tribunal relied upon a range of matters, as set out in [21] of its reasons, in arriving at its ultimate conclusion in [23] that it reasonably suspected that the work experience letter was not genuine. Some of the facts which underpinned those matters did not exist. In particular:

- (22) (1) the Tribunal's findings relating to risotto were based on a mishearing of the appellant's evidence;
- (23) (2) there was no evidence to support the Tribunal's adverse credibility finding arising from the appellant's evidence that he crumbed schnitzels with baking powder; and
- (24) (3) it was factually erroneous for the Tribunal to find that only one of the most popular menu items specified by the appellant was noted in the work experience letter.

94 Although, as noted above, the Tribunal identified other aspects of the appellant's oral evidence which contributed to its adverse conclusions, the matters set out above plainly were material to those conclusions. There is nothing in the Tribunal's reasons to suggest that those conclusions would have been arrived at by the Tribunal in the absence of its findings relating to the risotto and the most popular menu items (see *Minister for Immigration and Border Protection v CZBP* [2014] FCAFC 105 at [109] per Gordon, Robertson and Griffiths JJ).

(e) The primary judge's finding of lack of utility

95 In the amended application for judicial review in the proceeding below, the relief sought by the appellant included an order that the Tribunal's decision be quashed and a writ of mandamus be directed to the Tribunal to re-determine the appellant's review application according to law. There is no doubt that these remedies are discretionary and may be withheld in an appropriate case, notwithstanding that the judicial review applicant has established jurisdictional error, including on the ground of lack of utility or futility (see, for example, *R v Army Council; Ex parte Ravenscroft* [1917] 2 KB 504 at 511 per Viscount Reading CJ and the discussion in Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th edition, Law Book Co at [17.150]). However, as the learned authors of that leading text state there:

There is in all of these instances a real danger in saying that the ultimate outcome is obvious. Unless the eventual outcome is crystal clear, a consideration of a likely outcome might shade into a consideration of the desirable outcome, which is something that must be left to the primary decision-maker.

96 96 That passage correctly highlights the need for considerable caution before a remedy, such as mandamus, is withheld on the ground of lack of utility even where a jurisdictional error has been demonstrated. Helpful guidance can be obtained from the joint judgment of Gaudron and Gummow JJ in *Re Refugee Tribunal; Ex parte Aala* [2000] HCA 57; 204 CLR 82 (*Aala*) at [55] (footnotes omitted):

55 No doubt the discretion with respect to all remedies in s 75(v) is not to be exercised lightly against the grant of a final remedy, particularly where the officers of the Commonwealth in question do not constitute a federal court and there is no avenue of appeal to this Court under s 73 of the Constitution. The discretion is to be exercised against the background of the animating principle described by Gaudron J in *Enfield City Corporation v Development Assessment Commission*. Her Honour said:

“Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.”
(Footnote omitted.)

97 97 Their Honours acknowledged at [57] that, in cases of denial of procedural fairness, the nature of the alleged irregularity may be a matter going to the discretion to deny a remedy on the basis that, in any event, no different result would have been reached.

98 98 In *Aala*, Gaudron and Gummow JJ made the following pertinent observations at [80] (footnote omitted and emphasis added):

Thus, the second Tribunal's estimate of the cogency of the prosecutor's claim permeated its reasoning. The evidence before the first Tribunal was given on 4 December 1996. The 16 page statement which accompanied the application for an order for review by the Federal Court was dated shortly thereafter, on 14 January 1997. **It cannot be predicted that, had this been pointed out to the second Tribunal, it would inevitably have had a result which did not involve an adverse finding with respect to the prosecutor's credit. However, it can at least be said that this might have deterred the second Tribunal from concluding as it did. It is sufficient that “the denial of natural justice deprived [the prosecutor] of the possibility of a successful outcome”.**

99 99 The same can be said here. If the Tribunal had not made the errors it did relating to the risotto issue, the use of baking powder in crumbing chicken schnitzels and the appellant's identification of the most popular dishes, it **may** have been deterred from making the serious adverse findings concerning the genuineness of the work experience letter and the appellant's credibility generally. It is unclear whether or not the Tribunal would still have made those

serious findings by reference to the other adverse matters to which it referred in [21] of its reasons. This is not a case where it can confidently be said that it is inevitable that the Tribunal would make the same findings on a reconsideration. In our respectful view, the primary judge's reasons explaining why he would have considered there to be no utility in remitting the matter had he found a jurisdictional error, reveal that he fell into error by undertaking his own assessment of the overall merits of the appellant's case.

100 100 As Megarry J said in *John v Rees* [1970] Ch 345 at 402 (as referred to approvingly by Gaudron and Gummow JJ in *Aala* at [81]):

...[a]s everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

Conclusion

101 101 For these reasons, the appeal should be allowed and the orders of the FCCA set aside. In lieu thereof, it should be ordered that the application be allowed; the decision of the Tribunal quashed; and the matter remitted to the Administrative Appeals Tribunal for redetermination according to law. There is no apparent reason why costs should not follow the event both in this Court and the FCCA. Having regard to the appellant's success on the grounds set out above, it is unnecessary to determine the claims raised in ground 1A of the amended notice of appeal or the claims relating to apprehended bias.

102 102 Finally, we express our gratitude to Ms Schilling who accepted a referral to act for the appellant on a *pro bono* basis.

I certify that the preceding eighty-nine (89) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Griffiths and Moshinsky.

Associate:

Dated: 23 March 2017

